APPENDIX A—CONSTITUTIONS AND STATUTES.

Constitution of the United States, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Tennessee, Article 1, Section 6.

Sec. 6. Trial by jury—Qualifications of jurors.—That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

(Tennessee Code Annotated, Vol. 1 at 216.)

Constitution of Tennessee, Article 1, Section 8.

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

(Tennessee Code Annotated, Vol. 1 at 226.)

Constitution of Tennessee,
Article 1, Section 17.

Sec. 17. Open courts—Redress of injuries—Suits against the State.—That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

(Tennessee Code Annotated, Vol. 1 at 312.)

Tennessee Code Annotated, Section 27-819.

Review of Court of Appeals by Supreme Court.

The supreme court, or any judge thereof, shall have the right to require, by certiorari, the removal to that court for review of any case that has been finally determined in the court of appeals, upon a sworn petition for this purpose filed in the supreme court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review. (Acts 1925, Ch. 100.)

(Tennessee Code Annotated, Vol. 5, at 874.)

APPENDIX B—OPINIONS AND JUDGMENT BELOW.

Exhibit A—Memorandum Opinion.

Memorandum Opinion. Entered July 30, 1962.

Stanifer G. Byrd

vs.

Dixie Feed & Seed Co., Inc., et al.

In the Circuit Court of Hamilton County, Tennessee. No. 121,756.

This case is before the Court on motions for new trials filed by Mr. Byrd as against the defendant, J. R. Whitehead, d/b/a Comer Gin Company, and by the defendants, Dixie Feed & Seed Co., Inc., James Lee Johnson, and Dixie Portland Flour Mills, Inc., as against plaintiff, Stanifer G. Byrd.

I.

Considering first the motion filed by the plaintiff, Mr. Byrd, the jury returned verdicts for the plaintiff as against three of the defendants but decided against him in his claim versus J. R. Whitehead, etc. To have obtained a verdict against Mr. Whitehead, it was necessary for Mr. Byrd to convince the jury from the evidence that at the time of the accident, the defendant, James Lee Johnson, was an employee or agent of Mr. Whitehead and acting within the scope of his employment. This was fully covered in the Court's charge (Tr. p. 946) and the jury, as the triers of the facts, decided that the driver was not acting as the agent of Mr. Whitehead and returned a verdict, in favor of this defendant, to which the court agrees. Therefore, the motion of Mr. Byrd is overruled.

II.

The other three motions filed by the defendants are divided into two separate pleadings; one is in behalf of the Dixie Portland Flour Mills, Inc. As all three depend on similar alleged errors, the court will discuss them together whenever possible. For practicality, this memorandum will be divided into categories as follows:

A. Charge of the Court.

The trial of this case began on May 1, 1962, and ended when the jury reported its verdict on May 16, 1962.

This Court made every effort to see that the rights of all parties were protected and devoted considerable work in compiling a fair and equal charge to the jury (Tr. pp. 925-953).

Instructions are supposed to enlighten the jury on the applicable law. From this I consider the province and the duty of the trial judge to impart to the jury an understanding of the theories of the parties upon which their contentions are presented and to instruct the jury distinctly and precisely upon the law of the case. This is what I earnestly endeavored to do in this case.

In both motions complaint is made of the Court's use of words "loss of earning capacity." Due to the extreme injuries alleged and proved, the court feels it was proper to use this language.

In the motion of the Georgia defendants, reference is made to the use of the word "intelligence" in Ground XI. In answer thereto, the charge must be looked to "in toto". Tr. p. 940 recites this portion of the charge which I do not consider as error.

The court believes that, taking the instructions as a whole, they do not contain any prejudicial error for or against any of the parties.

The Court does, however, wish to call attention to one item contained in the amended motions of the Dixie Flour Mills. I refer first to Ground IV which contains this language "renewed after defendant stood on its motion for directed verdict." This statement is incorrect as this defendant did not renew its motion for a directed verdict during the course of the trial.

On July 16, 1962, an agreed order was entered allowing this defendant to amend its original motion by adding Grounds VII to XXXI inclusive.

Then on July 20, 1962, a second order was signed by the court which included the following language "and that said amendment now be filed of record in this cause."

The court can see no reason why this minor amendment should be "of record" whereas all other grounds in the motions heretofore filed have been entered in the usual way. It is, therefore, the order of the court that the above quoted language be stricken and included in the order made pursuant to this memo.

It is further contended by Dixie Portland Flour Mills that the court erred and charged the jury on certain questions that were included in plaintiff's declaration but were not sustained in the evidence presented. Particular reference was to the portion of the charge which included the instructions as to whether or not James Lee Johnson was acting as the agent of the Dixie Portland Flour Mills, Inc., at the time of the accident.

This was a part of the charge as this issued was included in plaintiff's declaration and it was the theory of the plaintiff and supported by proof that the defendant Johnson was following the instructions of supervisory employees of the Flour Mills in parking the tractor-trailer unit. This control was denied by the defendant company

which presented a material conflict in the evidence in reaching its verdict. And more important, the liability of the Flour Mills did not depend on this issue, but the controlling issue as to the Flour Mills' liability was its maintaining a dangerous wall surrounding a tractor-trailer parking lot without wheel guards on its premises, which the defendant company could have reasonably foreseen would eventually be struck by parking vehicles and fall to the injury of the public.

All parties emphasized this issue, and the court doubts if the jury gave any serious consideration to the agency question. Since it was a part of plaintiff's pleading, theory and proof, the court feels that it was properly included the charge.

B. Pleas in Abatement.

Complaint is made that the court erred in overruling the Pleas in Abatement filed by the Georgia defendants. The court heard testimony as to these Pleas and found that the Dixie Feed & Seed Co., Inc., a Georgia corporation, was duly in Court by service of process through the Secretary of State as provided by T. C. A. 20-224, and 48-923; and James Lee Johnson was served as provided in T. C. A. 20-224. The court can find no error in this ruling.

C. Selection of Jury.

In ground XXVI in the motion of Dixie Feed & Seed and James Lee Johnson, and ground XXXI in the motion of Dixie Portland Flour Mills, Inc., complaint is made that the court irregularly selected the members of the jury. As no objection or complaint was made until the filing of this motion, the court feels that the defendants waived an irregularity that it believed was taking place.

As these grounds raise the question as to the court's action, there is introduced the Panel list of 84 members

of the jury. Of these, there were 48 present at the opening of the trial. Jurors present were Nos. 4, 5, 6 and 7. The court instructed juror No. 7 to take places in the jury box. It so happened that this jury was composed entirely of men. It also so happened that men were called from the remaining jurors when challenges were exercised. Thus, a jury of 12 men was selected. The court then granted the selection of a 13th juror by reason of the anticipated factors involved in the trial. The court started to select a woman juror as a 13th juror and then the thought occurred to the Court that, considering the anticipated length of the trial, the type injury alleged by the plaintiff, male and female rest rooms adjoining in a 12′ x 18′ jury room, and the possibilities of embarrassment to one lady serving with 12 men, the selection of an additional male member would be preferable. Under these circumstances (see Tr. p. 68) I believe such a decision was discretionary and can see no error in this action.

D. Number of Challenges.

At the beginning of the trial the question arose as to the division of challenges among the four defendants. (Tr. p. 4 and 5.) I followed the 1955 Public Act which entitled the four defendants to a total of six challenges. The Act provides that the Trial Court shall, in its discretion, divide the aggregate number of challenges. I, therefore, allowed four challenges to the three Georgia defendants and two to the one local defendant. None of the parties exercised all of the challenges granted them. In my opinion the jury's verdict shows that the three Georgia defendants did not have identical defenses. I can see no error in my holding.

E. Excessiveness of Verdict.

Complaint is made as to the amount of the verdict as being excessive, and so excessive as to indicate passion,

prejudice or unaccountable caprice on the jury's part. Defendant's counsel for the Georgia defendants made the request that, if the court does not grant a new trial, a substantial remittitur be suggested.

In reviewing all of the evidence, especially that of a medical nature, the court cannot agree that the jury's verdict was excessive. Reference is made to the testimony of the various doctors who have attended the plaintiff and who testified as to the severity of his injuries.

There is no yardstick to measure the proper amount of a verdict. Each case must be examined on its own facts, considering, among other things, the permanency and character of the injury, pain and suffering attendant thereto, medical costs, and all of the other elements of damages. This court observed and heard the plaintiff and the other witnesses concerning the magnitude of the injury and its consequences, and concurs with the jury as to the amount of the verdict.

F. Violation of City Building Code.

There was introduced in evidence an ordinance of the City of Chattanooga which adopted, by reference a Building Code for said City.

The jury heard the evidence introduced in regard to said Code and the manner in which specified sections were said to have been violated.

In the court's charge (Tr. pp. 928-930) the plaintiff's contention in regard to this Code was told to the jury. Also, in the special pleas of the Georgia defendants as contained in the charge (Tr. p. 933), the alleged violation of the Code was cited. All of these allegations were specifically denied by the Dixie Portland Flour Mills, Inc., in its special pleas (Tr. p. 938).

The court finds no error in regard to the evidence or charge concerning the City Building Code.

G. Standing on Motion for a Directed Verdict.

After the defendant Dixie Flour Mills' motion for a directed verdict was overruled, its counsel elected to stand on its motion. This created a novel situation for this court.

After a great deal of discussion, it was held that the Georgia defendants could introduce proof against their co-defendant, Flour Mills, as well as proof in their own defense.

This was done, and all tendered testimony was considered. After all parties had rested their cases, counsel for the Georgia defendants renewed their motions made at the conclusion of plaintiff's testimony, but counsel for the defendant, Dixie Flour Mills, did not renew its former motion but did join in the arguments made to the jury.

In amended motions for a new trial, attempts were made to renew the original motions which the court rules are untimely made, and are overruled.

H. Proximate Cause Proximate Intervening Cause.

This is one of the most important legal questions raised by counsel for all the parties and, for this case, proximate cause and proximate intervening cause will be discussed under the same heading.

The court is in complete agreement that the plaintiff must make out a prima facie case when tested by a motion for a directed verdict.

In this case, the plaintiff had established by sufficient evidence that the defendant Flour Mills as lessee, re-

moved a roof which rested upon the wall involved in this accident. There can be no doubt from all the evidence that this action left a standing wall without any exterior support, located adjacent to the public sidewalk, used by the defendant Flour Mills as an enclosure of a truck parking lot and without any wheel guards or protective measures being taken on the interior of the lot. The Court believes the defendant Flour Mills was negligent both in changing the use of this structure and in the maintenance of the wall without safeguards in its then status. It was open to the view of this defendant who daily used the enclosure for the parking or tractor-trailers and other vehicles in the immediate proximity of the wall. It was only a question of time, under the circumstances existing, until some force would accidentally or otherwise contact this unsupported wall which would topple it over on whoever happened to be nearby. The court is satisfied that the defendant Flour Mills was guilty of actionable negligence in the above regards.

There can be no dispute that defendant James Lee Johnson was guilty of actionable negligence in the way and manner he parked the tractor-trailer.

However, this negligence on the part of defendant Johnson cannot be used to exonerate the defendant Flour Mills as an independent intervening cause, as his action was foreseeable from the time the defendant permitted parking near the wall.

The Court has attempted to review all cases in point and feels that the recent case of Friendship Telephone Co. v. Russom, 309 S. W. 2nd 416, is the most related to our instant case than any presented to the court. It satisfies the court completely as to the foreseeability issue and the liability of the defendant, Flour Mills.

The Court can see no error in any of the other grounds alleged, by either of the three defendants.

The Court is of the opinion that the jury reached correct conclusions as to the liability of each of the defendants as found by the jury.

III.

This memo will be filed by the Clerk and made a part of the record in this case. Copies are to be sent to counsel listed below and plaintiff's attorney is to draw an order to conform to this memo.

Order to Amend — Entered August 1, 1962

Stanifer G. Byrd

vs.

Dixie Feed & Seed Co., Inc., et al.

In the Circuit Court of Hamilton County, Tennessee. No. 121,756.

In this cause, it is ordered by the court that the Memorandum Opinion heretofore filed by the court be amended to strike therefrom the seventh paragraph on page Two (2) thereof.

This amendment to the Memorandum Opinion will be filed by the Clerk and made a part of the record in this cause.

Exhibit B—Opinion of the Court of Appeals of Tennessee.

In the
Court of Appeals of Tennessee.
Eastern Section.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs in Error, Versus Stanifer G. Byrd, Defendant in Error.	From the Circuit Court of Hamilton County. Honorable John T. Mahoney, Judge.

Folts, Bishop, Thomas, Leitner & Mann of Chattanooga for Dixie Seed & Feed Company and James Lee Johnson.

Strang, Fletcher, Carriger & Walker of Chattanooga for Dixie Portland Flour Mills, Inc.

H. Keith Harber of Chattanooga for Stanifer G. Byrd.

Opinion.

(Filed Jul. 22, 1963, W. H. Eagle, Clerk.)

McAmis, (P. J.)

Stanifer G. Byrd sued Dixie Feed & Seed Company, Inc., and James Lee Johnson, driver of its truck, and Dixie Portland Flour Mills, Inc., for personal injuries sustained when the truck backed into a cinder block wall on the premises of the Flour Mills causing it to topple and fall on plaintiff as he walked along an abutting sidewalk in Chattanooga. There was a verdict and judgment against all of the above named defendants for $380,000.00 from which they prosecute the present appeal.

Dixie Feed & Seed Company, Inc., is a non-resident corporation with situs at Comer, Georgia, where its driver, James Lee Johnson resides. At the time plaintiff was injured, Dixie Portland Flour Mills, Incorporated, occupied, under a lease contract, premises on King Street in Chattanooga where it received, stored and processed grain. A parking area fronting on King Street was enclosed with a cinder block wall approximately 11 feet high. Truck drivers delivering grain were directed to enter this area and park awaiting an opportunity to unload. On one or more previous trips, defendant Johnson had been told by agents of the Flour Mills to park his truck in this area.

On the day of the accident, Johnson drove the truck of the Feed & Seed Company loaded with grain into this parking area to await his turn to unload. He backed the truck within about 1 foot of the wall and cut the switch. Thinking the motor had stopped, he took his foot off the clutch. Thereupon the truck being in reverse gear lurched backward, struck the wall and toppled it upon plaintiff inflicting grievous injuries, the nature and extent of which will be hereinafter detailed. Johnson was aware that the truck had acted in this way on one previous occasion.

Johnson and the Feed and Seed Company were brought before the court by service of process on the Secretary of State pursuant to the provision of T. C. A. 20-224 giving the courts of Tennessee jurisdiction over nonresident owners and operators of vehicles registered in a foreign state. Both filed pleas in abatement on the ground, among others, that since the truck was upon private property and was not being operated on a public highway the statute authorizing service of process upon the Secretary of State has no application.

We think, under the unique circumstances of this case, the statute applies. The offending vehicle upon coming into the State made use of the public highways of Tennessee for the purpose of delivering grain at the point where the injury occurred in consummation of the owner's contract. Delivery by motor truck at that point could not have been effected without the use of the public highways of Tennessee. And, while there is no proof that the rear of the truck crossed the property line, it was within less than a foot of the street line when it struck the wall and the force of the impact caused the wall to fall on the sidewalk of King Street, a public thoroughfare. Under these circumstances it would be doctrinaire in the extreme to say that a person so injured is to be denied the benefit of the statute solely on the ground that the vehicle was not being operated upon a public thoroughfare.

The question it seems to us was put to rest in Bertrand v. Wilds, 198 Tenn. 543. In that case the injury occurred on a road within the grounds of a veterans hospital and, therefore, not upon a public highway or road. The plea in abatement in that case asserted a lack of jurisdiction, to which the author of the opinion, Mr. Chief Justice Neil, after noting that the vehicle had used the public highways to reach the hospital grounds, responded:

"It is our well-considered opinion that the statute applies to the operation of motor vehicle upon public highways by nonresidents and also to the operation of such vehicles on private property, as a necessary incident to public travel upon the streets and highways of this State. Paduchik v. Mikoff, 158 Ohio St. 533, 110 N. E. (2d) 562, construing the statute of Ohio, which is similar to ours, and Sipe v. Moyers, 353 Pa. 75, 44 A. (2d) 263, construing the Pennsylvania statute, which is also similar in all respects to our own statute.

"In Paduchik v. Mikoff, supra, the defendant's contention was identical with the defendant, petitioner in the instant case, that is, that the 'substitution of service statute' was not applicable unless the accident happened on a public highway. The sole issue involved the jurisdiction of the local courts of Ohio over the person of a nonresident who was enjoying the privilege of using the state's highways. In ruling upon this issue, it was held (158 Ohio St. 533, 110 N. E. (2d) 567):

" 'Unquestionably, such jurisdiction extends to the operation of motor vehicles on the public highways of the state and, in the opinion of this court, it also extends to the operation of the motor vehicle operated on private property in private garages and on private parking lots **as an incident to its operation on such highways.**' (Emphasis supplied.)

"It is true there are cases to the contrary, such as where the accident happened while operating a 'combine harvester' in a wheat field in such a manner as to set fire to and destroy twenty-one (21), acres of wheat. Kelley v. Koetting, 164 Kan. 542, 190 P. (2d) 361, and other cases cited by the Ohio Court.

"The living force of our statute, however, and similar statutes in other states, clearly serves the public interest. These statutes, reasonably adopted to remedy the evil of an ever increasing number of accidents arising from the operation of motor vehicles both on our highways and elsewhere, represent a constitutional exercise of the police power."

In Ellis v. Georgia Marble Co., 191 Tenn. 229, the statute was invoked to bring in the nonresident owner of a truck from which the plaintiff when injured was unloading marble. The declaration charged negligent packing of the marble before it left Georgia. In an opinion by Mr. Justice

Burnett, the statute was held inapplicable not because the truck was standing on private property but, as we read the opinion, because the vehicle was never "involved" in an accident. That case is not in point under the facts of this case.

The first assignment of the Feed & Seed Company and Johnson complaining of the overruling of their plea in abatement is overruled. It is unnecessary to consider whether the Feed & Seed Company was amenable as a foreign corporation doing business in Tennessee to process on the Secretary of State under T. C. A. 48-923.

The Feed & Seed Company insists the Court erred in refusing to charge its special request to the effect that any recovery allowed plaintiff would not be subject to the payment of Federal Income taxes. In the excellent brief of counsel it is very properly conceded that this action of the Court is in accord with the weight of authority. It is said, however, that the minority view is supported by the better reasoned cases and should be followed in this state. We can not agree.

In connection with a comprehensive annotation on this subject it is said editorially at 63 A. L. R. 2d 1398:

"From the personal injury cases dealing with the present topic, it can be said that the more general view, supported directly and inferentially by the decided majority of the American cases, is that in fixing damages for accrued loss of earnings or for impairment of future earning capacity because of personal injuries, the income tax consequences of the injury and the award should not be taken into consideration; on the contrary, the award of damages should be based upon the plaintiff's gross earnings or earning capacity and should not be reduced because of any income tax saving which may result to the plaintiff from the fact that the damages will be exempt from income tax."

As appears from an analysis of the cases appearing in the above annotation, the reasons advanced in support of the majority view are that to deduct the anticipated tax saving from the recovery would nullify the tax benefit conferred by Congress in expressly exempting damages for personal injuries and would unduly complicate the trial of personal injury cases. In addition, we think, to attempt to do so would inject into the already difficult and complicated computation of such damages factors which change from time to time, such as the rate of taxation and the number of plaintiff's exemptions, and allow juries to indulge in speculation and conjecture in arriving at the amount to be deducted.

It is next insisted the Court erred in excluding evidence offered to show plaintiff's optional and compulsory retirement ages as a postal employee, his retirement benefits and the payment to him after he was injured of accumulated sick leave benefits.

In resolving this question it is important to keep in mind that in an action to recover for personal injuries it is not the loss of time or earnings that the wrongdoer must pay for but loss of the ability to earn that constitutes an element of damages. This was made clear by Judge Felts, now Mr. Justice Felts, in Southern Coach Lines, Inc. v. Wilson, 31 Tenn. App. 240 where it was said:

"It is true this distinction is often not observed. Indeed, it is of no practical importance in some cases. For instance, in a case where the plaintiff was earning, and, if he had not been injured, would have continued to earn at the same rate during the period of his incapacity, his loss in earnings furnishes practically an accurate measure of his loss in earning capacity. But in other cases the distinction is vital and failure to observe it would lead to an unjust result.

"This is true in a number of cases where recovery is allowed for loss of earning capacity though there has been no loss of earnings; as where plaintiff's employer gratuitously paid his wages during his incapacity (Railroad Co. v. Porter, 117 Tenn. 13, 94 S. W. 666); where he is receiving greater wages than before his injury (Central Mfg. Co. v. Cotton, 108 Tenn. 63, 66, 65 S. W. 403; Adamant Stone & Roofing Co. v. Vaughn, 7 Tenn. App. 170, 181; Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal. App. (2d) 795, 151 P. (2d) 647); or where he was not working and would not have worked during the period of his incapacity. Doherty v. Ruiz, supra; McIver v. Gloria, 140 Tex. 566, 169 S. W. (2d) 710; Mississippi Cent. R. Co. v. Smith, 176 Miss. 306, 168 So. 604; Restatement, Torts, secs. 906 (Comment c) and 924 (Comment c)."

In Railroad v. Porter, 117 Tenn. 13, cited by Judge Felts, the Court dealt at some length with the propriety of considering in diminution of damages compensation gratuitiously paid by the plaintiff's employer after he was injured and cited a number of cases from other jurisdictions dealing with this question as well as the question of benefits accruing under insurance contracts. As we read the opinion it holds unequivocally that these are extraneous matters and are not to be considered.

The modern tendency is to regard pension benefits as deferred compensation for services rendered. So considered, they represent accumulated savings as much as money in the bank or investments in income producing property. With the exception of cases arising under the Federal Tort Claims Act the courts unanimously hold that damages in personal injury cases are not subject to mitigation because the plaintiff is receiving or will receive a pension. Anno. 75 A. L. R. 2d 886.

The assignment of the Feed & Seed Company and Johnson as well as that of the Flour Mills complaining of the exclusion of this evidence are overruled. Discussion of the assignments of all defendants complaining of the amount of the verdict will be jointly considered after disposing of the other assignments of the Four Mills.

Its first assignment is that the Court erred in not sustaining its motion for a directed verdict at the close of plaintiff's proof in chief. Interwoven with this insistence is the question of the effect of this defendant standing on its motion and announcing that it had rested, would disclaim the benefit of any evidence thereafter introduced by its co-defendants and would not be bound by any further evidence introduced in the case.

In disposing of this assignment we need not consider the effect of this announcement, for we have concluded that plaintiff's evidence in chief was sufficient to take the case to the jury and constitutes material evidence sustaining the verdict. On that question, a statement of the averments of the common law count of the declaration and a brief summary of plaintiff's proof in chief will suffice.

The common law count charges that after defendant Flour Mills entered into possession of the premises under lease contract it removed an existing roof over the parking area in question which had theretofore served to brace and strengthen the wall without providing other braking action in lieu thereof, failed to warn drivers of incoming truck loads of grain that the cinder-block wall was unsupported and unprotected by wheel guards adjacent to the wall to check any trucks in the area and prevent them from coming in contact with the wall with resulting danger to pedestrians on the sidewalk and that no warning was given pedestrians of the danger of trucks being parked within the parking area next to the wall.

Clifford A. Betts, Jr., a structural engineer, testified that he had examined the wall; that it was too high for its width, was unstable and insufficient to withstand wind pressures. As to its adequacy as an enclosure for a parking lot and what would have been necessary to make it suitable for that purpose he testified:

"Number one, it would be absolutely necessary to put in some sort of wheel barrier a distance of . . . in the neighborhood of five or six feet, say, and high enough to prevent a vehicle from coming in contact with the structure. Number two, the wall would have to be braced up with either buttresses or piers, as I mentioned before, no less than two, in my opinion, would be necessary, centered or spaced out evenly along the wall's length."

Mr. Betts further testified that the roof previously supported by the wall served to stabilize it by preventing it from moving sideways as the result of pressure from the side.

Other proof for plaintiff established that the truck, operated by defendant Johnson in the area where he had previously been directed to park by agents of the Flour Mills, while so parking struck the wall and caused it to fall upon the sidewalk where it struck and injured plaintiff.

It is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury. The Court was not asked to rule separately on each count of the declaration. The motion was general and in the absence of such request there was no error in failing to direct a verdict on those counts of the declaration charging a violation of the municipal building code. As said in Tayor et al. v. Cobble, et al., 28 Tenn. App. 177, it is impractical to expect the trial judge on general motion for a directed verdict to apply the proof to the several counts of the declaration without any expression or assistance from counsel for the moving party.

Under assignment Three it is insisted the court erred in refusing to charge as requested that, the Flour Mills having rested its case and made the announcement above mentioned, the jury should not consider as against it evidence introduced by its co-defendants.

The granting of the motion for a directed verdict at the close of plaintiff's proof in chief was a matter within the discretion of the trial judge. Since he exercised that discretion by overruling the motion, evidence could thereafter be introduced touching the liability of the Feed & Seed Company. It follows that there was no error in declining to charge the special request. Sadler v. Draper, 46 Tenn. App. 1, 326 S. W. 2d 148.

If we are mistaken in this holding, however, we do not think the Feed & Seed Company was prejudiced in view of the undisputed evidence of the condition of the wall above detailed.

The second half of this assignment complains of the refusal of the Court to charge as requested:

"Gentlemen of the Jury, I further charge you that where two distinct causes, unrelated in operation, contribute to an injury and one of them is the direct proximate cause and the other merely furnished the condition or gave rise to the occasion by which the injury was made possible the former will alone be regarded as responsible for the result."

The refusal to so charge was not error. The Feed & Seed Company did more than merely create the condition by which the injury was made possible. Knowing the unstable condition of the wall it invited truck drivers to park their trucks in such close proximity thereto that any slight miscalculation of drivers could cause an injury to persons on the sidewalk.

The fourth assignment is that the Court erred in charging:

"Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of Dixie Portland Flour Mills, Incorporated, upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of Dixie Portland Flour Mills, Incorporated."

While the Court did not in terms relate this charge to the act of the Flour Mills in directing drivers where to park, the jury may have so assumed.

At first blush, it seems erroneous to consider Johnson the agent of the Flour Mills. However, the record shows that one reason for lining up the trucks near the wall as they entered the premises was to prevent congestion which might interfere with the movement of trucks out of the plant carrying the finished product of the Flour Mills. To that extent it had an interest in the parking of trucks near the wall and to that limited extent we think if Johnson acted under the instructions of the Flour Mills he might be considered its agent. There is no suggestion that Johnson ever acted in any other way as the agent of the Flour Mills and, unless the charge complained of is to be taken as relating to the parking of the truck at the particular place in question, it is a mere abstraction in the charge.

The appellate court will not reverse on the ground the court charged the jury on an abstract proposition not raised or having no application to the proven facts unless

it affirmatively appears that the charge affected the result of the trial. Hughes v. Taylor, 29 Tenn. App. 548, 198 S. W. 2d 337, and cases cited.

While we think it would have been better either to have omitted this charge altogether or related it directly to the purpose of the Feed & Seed Company to keep the parking area clear for its outgoing trucks, it does not affirmatively appear that this portion of the charge affected the result of the trial. On the contrary, in view of the undisputed evidence that due to the removal of the roof and the absence of a guard curb the wall was a hazard to pedestrians on the sidewalk, we think it most unlikely that the jury gave any consideration to whether Johnson acted as agent of the Flour Mills in parking the truck and cutting the switch in such close proximity to the wall, as charged. The charge is not necessarily to be taken as leaving that question to the jury and, therefore, is to be considered ambiguous rather than affirmatively erroneous.

Other assignments relating to the charge have been considered and found without merit because not shown to be prejudicial in view of the undisputed evidence of common law negligence or because not included in the motion for a new trial. To discuss each at length would extend this opinion beyond reasonable limits.

Remaining to be considered is the question of the excessiveness of the verdict.

The injuries sustained by plaintiff were unusual and devastating. Although his mind was not affected, that he is totally and permanently disabled appears without serious question. At the time of the accident he was regularly employed as the operator of a mail delivery truck, earning with overtime pay, approximately $6,000.00 per year. At the time of the accident he was 59 years of age and had a life expectancy of 16.4 years. At the

time of the trial he had suffered a loss of earnings amounting to $10,848.06. If he had worked on until compelled to retire at age 70, his earnings subsequent to the date of trial would amount to approximately $51,000.00. His total medical expenses to the date of the trial amounted to $35,343.14. His physician, Dr. Arnold, estimated that his future bills for drugs, dressings and disposal bags will amount to $50.00 per month or, for the period of expectancy following the trial, a total of $8,760.00 and that his doctor should check him about once each week. The cost of such future calls at $5.00 would amount to approximately $3500.00.

Computed up to the date of compulsory retirement his loss of income, past and future, totals $61,848.00; medical expenses already incurred $35,343.14; future medical supplies $8,760.00, making a total of $105,951.14, exclusive of future doctor's bills, hospital bills and nursing. These prospective expenses require some further development of the extent and nature of plaintiff's injuries.

The medical proof shows that, due to a spinal injury, plaintiff is permanently paralyzed from the navel down. Due to this injury and complications arising therefrom he has had, including plastic operations resulting from a severe and deep seated bed sore, eleven major surgical operations. To prevent infection due to a complete inability to control kidney and bowels action, drainage outside the body had to be provided, necessitating disposal bags outside the body for urine and the opening of the abdomen to bring the large bowel outside where it was stitched to the outer wall and where it will have to remain. This, however, does not solve the lack of bowel control. He has suffered a complete loss of sexual powers.

The medical proof is that with proper medical and nursing care plaintiff should live out his normal expect-

ancy. He will have to remain in bed for the greater part of each day but will be able to sit in a wheel chair an hour or more during the day. He will be able to propel and guide the chair within his home. With adequate assistance he can get in and out of an automobile and possibly operate a specially constructed car himself.

There is little or no dispute that he will need throughout the remainder of his life someone subject to call 24 hours a day. This must be a person strong enough to lift him in and out of bed and into the wheel chair. While the person in attendance need not be a registered nurse or even a licensed practical nurse, such person must have sufficient experience in handling such cases to recognize and meet problems as they arise and willing and capable of attending to his disposal facilities. To prevent bed sores common to persons paralyzed below the waist it will be necessary that he be turned every two hours. Except when hospitalization may occasionally be necessary he will be able to live at home.

There is no proof as to the probable cost of hiring persons capable of performing the necessary nursing duties and strong enough to do the required lifting. The nearest approach is proof that licensed practical nurses charge $12.00 for an eight hour day. On that basis and assuming the need for three shifts during each 24 hours, plaintiff's counsel arrives at the figure $191,736.00 by multiplying $36.00 by 127,824 hours life expectancy.

Our difficulty lies in the fact that according to plaintiff's physician a licensed practical nurse will not necessarily be required and that constant attendance and care will not be necessary but only that someone be subject to call. Another deficiency in the record is the lack of proof that persons possessing the inclination and training to do this work can be obtained and the probable cost of obtaining such services.

If we accept counsel's figure of $191,736.00 and add to that the above figure of $105,951.14 we arrive at a total of $297,687.14 without considering possible future doctor's bills, pain and suffering, inconvenience and the deprivation of the enjoyment of the normal activities of life. We can not know how much value the jury may have placed upon such intangible elements of damage.

If, as seems probable, the jury accepted plaintiff's figure of $36.00 per day for three shifts of licensed practical nurses and multiplied that figure by plaintiff's life expectancy, they found that the total future nursing cost would amount to $191,736.00. This figure added to our figure of $105,951.14 actual expenses and loss of earnings, past and prospective, would amount to $297,687.14. From this it may be inferred that the jury allowed the difference between that figure and the $380,000.00 verdict, or approximately $80,000.00 for pain and suffering, etc.

While we have no disposition to minimize the great tragedy that has befallen plaintiff, the proof shows that due to paralysis the pain has not been commensurate with the other elements of damages.

It is obvious from the foregoing statement of plaintiff's injuries and resulting loss of income and expenses for medical and nursing care, both past and prospective, that a verdict and judgment in excess of any heretofore considered by the appellate courts of Tennessee is warranted. We are, therefore, not justified in suggesting a remittitur because the amount is in excess of any verdict heretofore approved. The rule guiding our deliberation remains the same, i. e., we are to remember that the amount to be awarded in personal injury cases is primarily within the discretion of the jury and trial judge and we are not to substitute our judgment for theirs or interfere unless there has been an abuse of

discretion and the amount of the verdict is so large as to strike the average mind as palpably excessive and unjust. And if a remittitur is suggested the amount suggested should be only "such amount that, if accepted, the verdict, as reduced, would not be palpably excessive, giving to the jury and trial judge the latitude in fixing the amount to which they are entitled in the free exercise of their discretion." Olson v. Sharpe, 26 Tenn. App. 557.

To apply these guiding principles to the case at bar, we feel that a remittitur in some amount is indicated since the proof failed to establish the need for licensed practical nurses 24 hours of each day. The plaintiff's own proof disproves this hypothesis as above noted; and the record fails to show what it would cost to have a person with the required qualification, perhaps living in the home, on call for 24 hours each day. If such a person should be used the value of board and lodging should be added. In the present state of the record we could, at best, only guess at a proper allowance for future nursing expense, as the jury must also have been forced to do under the undisputed evidence above discussed.

Reluctant as we are under the circumstances to attempt to suggest an amount, remembering that plaintiff does not have to accept it, we suggest a remittitur of $90,000.00. If accepted, judgment will be entered here for $290,000.00. Costs are adjudged against defendants and sureties on their appeal bonds.

L. Amis,
Presiding Judge.

Concur:

Cooper, J.,
Judge.

Taylor,
Sp. Judge.

Exhibit C—Opinion of the Court of Appeals of Tennessee, on Petition to Rehear.

Dixie Feed & Seed Co. et al.

versus

Stanifer G. Byrd.

} Hamilton Law.

(Filed September 27, 1963, W. H. Eagle, Clerk.)

Petitions to rehear have been filed by Dixie Feed & Seed Company and its driver Johnson and by Dixie Portland Flour Mills, Inc.

In their petition to rehear Dixie Feed & Seed Company and Johnson first complain because we failed to pass on whether the Feed & Seed Company was subject to process under T. C. A. 48-923. Having held the Feed & Seed Company and Johnson subject to process under T. C. A. 20-224, it was not necessary to hold whether the Feed and Seed Company was also amenable to service as a non resident corporation doing business in Tennessee. This Court is not required or expected to rule upon questions of law deemed to be immaterial or non-determinative of the result. To do so would invite confusion and uncertainty as to whether the holding should be regarded as authoritative or mere dictum.

These petitioners further complain because we failed to pass upon the constitutionality of T. C. A. 48-923 and T. C. A. 20-224. As pointed out it was unnecessary to pass upon the applicability of T. C. A. 48-923. This holding eliminated the necessity of passing upon its constitutionality. As to the constitutionality of T. C. A. 20-224, we cited and quoted at some length from Bertrand v. Wilds, 198 Tenn. 543, where the question of the constitutionality of the statute is discussed and the statute

sustained as a proper exercise of the police power. It was our intention to hold it constitutional. It is so held.

The petition to rehear of the Feed & Seed Company and Johnson are overruled.

The first ground of the petition filed in behalf of Dixie Portland Flour Mills is that we erroneously treated its motion as a general motion for a directed verdict when, in fact, the following was added at the end of the motion: "and a special motion on each count of the declaration."

We need not decide whether this language had the effect of making the motion something more than a general motion for a directed verdict. Even if it did have that effect, failure of the Court to sustain the motion as to the second count of the declaration charging a violation of the ordinances of the City of Chattanooga adopting a building code did not constitute reversible error in view of the evidence of common law negligence tending to sustain the first count of the declaration.

In City Transportation Corp. v. Seekler, 32 Tenn. App. 661, it was said (p. 667):

"If we are mistaken, however, in holding that the court was not in error in overruling the motion for directed verdict as to the charge of the declaration respecting the school zone speed limit, we are clearly of opinion it is the duty of this court to treat any error in respect to that charge as harmless and apply to the judgment the findings of the jury on the common law counts and the charges of violating the 30 mile speed limit in business and residential areas contained in the statutory count."

The opinion cites in support of the holding the opinion of Mr. Chief Justice Green in Tennessee Central Railway Co. v. Umenstetter, 155 Tenn. 235, 291 S. W. 452, 453,

and see Taylor et al. v. Cobble et al., cited in our original opinion.

Under the second ground of the petition to rehear it is insisted we failed to respond to petitioner's assignment of error complaining that the trial court erred in admitting into evidence a building code "in no way relevant to the issues before the court."

As noted in our original opinion the witness Betts, a structural engineer, testified as to the instability of the walls. The Flour Mills offered no evidence to the contrary. Thus there was undisputed evidence from which the jury could find common law negligence. It is immaterial whether, as charged in the declaration, the wall as so constructed was also in violation of the building code which the Flour Mills insists does not apply. It, therefore, does not affirmatively appear that, even if erroneous, the admission of this evidence affected the result of the trial.

Under T. C. A. 27-117, we are forbidden to reverse where there is sufficient competent evidence to sustain the verdict and it does not affirmatively appear that the erroneous admission of evidence affected the result. Louvier v. Nashville, 1 Tenn. App. 401; Butler v. State, 185 Tenn. 686; Management Service, Inc. v. Hellman, 40 Tenn. App. 127, 289 S. W. 2d 711.

It is next insisted we erred in not reversing because of certain remarks made by the trial judge in the presence of the jury. The assignment predicated upon these remarks was overruled because not embraced within the motion for a new trial.

As pointed out in the reply brief the writer inadvertently referred in the former opinion to Dixie Feed & Seed Company where Dixie Portland Flour Mills was obviously intended. These erroneous references are recalled and corrected.

We are also asked to limit the time within which the remittitur may be accepted. The time will be limited to the period of 10 days after the filing of this opinion.

For reasons indicated we adhere to our original conclusion that the judgment should be affirmed, subject to the suggested remittitur.

L. Amis,
Presiding Judge.

Concur:

Cooper, J.,
Judge,

Taylor,
Special Judge.

Exhibit D—Judgment of the Court of Appeals of Tennessee.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, R. E. Cooper and Special Judge Earnest R. Taylor.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

In the Court of Appeals of Tennessee.
Eastern Section.

May Term 1963.

Friday, May 17th, 1963.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs-in-error vs. Stanifer G. Byrd, Defendant-in-error.	No. 88. Hamilton County Law. Affirmed.

Judgment.

(Filed Aug. 28, 1963, W. H. Eagle, Clerk.)

This cause came on to be heard on the transcript of the record from the Circuit Court of Hamilton County, Tennessee, assignment of errors, briefs and argument of counsel, from all of which the Court is of the opinion and Orders and Adjudges that there is no error in the judgment of the Trial Court for the reasons set forth in the opinion of the Court, filed herein and made a part of the record in this case except for a suggested remittitur, and that the assignment of errors are all overruled and disallowed with the exception of the assignments as to excessiveness of the verdict, which are sustained and which result in a suggested remittitur of Ninety Thousand ($90,000.00) Dollars from the judgment of Three Hundred Eighty Thousand ($380,000.00) Dollars. The judgment of the Trial Court in all things other than amount is affirmed. Stanifer G. Byrd, defendant-in-error through his attorney hereby elects to make the remittitur under protest in accord with Section 27-119, Tennessee Code Annotated. It is therefore:

Ordered and Adjudged by the Court that the judgment of the Court below be and the same is in all things affirmed with a remittitur of Ninety Thousand ($90,000.00) Dollars made under protest of defendant-in-error from the judgment of Three Hundred Eighty Thousand ($380,000.00) Dollars and the defendant-in-error, Stanifer G. Byrd shall have and recover of the plaintiffs-in-error, Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., the sum of Two Hundred Ninety Thousand ($290,000.00) Dollars and costs of the cause for all of which execution is awarded.

Consent to entry of this judgment shall not be considered as waiving or abandoning the pending petitions to rehear, and to this extent this shall not be deemed the final judgment herein. The judgment on the pending petitions to rehear shall be the final judgment herein, after which both plaintiffs-in-error and defendant-in-error shall have forty-five (45) days within which to file petitions for writ of certiorari.

Enter this .... day of August, 1963.

.....

Presiding Judge.

O. K.

Folts, Bishop, Thomas, Leitner & Mann,
Attorneys for Dixie Feed & Seed Company, Inc.,
and James Lee Johnson.

By: W. Neil Thomas, Jr.

Strang, Fletcher, Carriger & Walker,
Attorneys for Dixie Portland Flour Mills, Inc.

By: John S. Carriger.

H. Keith Harber,
Attorney for Stanifer G. Byrd.

H. Keith Harber.

Exhibit E.—Denial of Petition to Rehear, Making Judgment (Exhibit D, Above) Final.

In the Court of Appeals of Tennessee at Knoxville.

May Term 1963.

Friday, Sept. 27th, 1963.

Court met pursuant to adjournment, present and presiding the Honorable Judges Luke M. McAmis, Robert E. Cooper and Special Judge S. J. Milligan.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.

vs.

Stanifer G. Byrd.

Hamilton Law. Petitions to Rehear Denied.

This cause came on to be further heard on the Petitions to Rehear and Reply thereto, upon consideration whereof the Court is of opinion the petitions are not well taken and should be denied.

It is therefore ordered and decreed that the petitions to rehear are denied, excepting that a time limit be set to a period of ten days after the filing of the Court's opinion to accept the suggested remitfitur.

Costs on petitions to rehear will be paid one-half by Dixie Feed & Seed Company, Inc., and James Lee Johnson and sureties Folts, Bishop, Thomas, Leitner and Mann and one-half by Dixie Portland Flour Mills, Inc., and sureties Goins, Gammon, Baker and Robinson and Strang, Fletcher, Carriger and Walker, for which let execution issue.

APPENDIX C—RECORD EXTRACT SHOWING HOW FEDERAL QUESTION IS PRESENTED.

1. Motion for New Trial.

III.

The verdict is contrary to the law applicable to the cause.

XII.

The Court erred in charging the jury as follows:

"However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all of the defendants."

XIX.

The Court erred in charging the jury as follows:

Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated.

XX.

The Court erred in charging the jury as follows:

If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendant.

2. Assignments of Error, Dixie Portland Flour Mills, Inc.

I.

The Court Erred in Not Directing a Verdict for Defendant Flour Mill.

* * * * * * * *

The verdict is contrary to the law applicable to the case.

* * * * * * * *

IV. (a)

It was error for the Trial Judge to instruct the jury as follows:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills, upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated." (Tr. 1132).

And it was error for the Trial Judge to instruct the jury:

> "If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendant" (Tr. 1133).

It was error for the Court to give either or both of these parts of the Charge for the reason that there was no evidence that the said Johnson was in any way the agent or servant of Flour Mill; and further, in the first portion mentioned above the Trial Judge did not correctly instruct the jury on applicable law in that he erroneously charged that if Johnson "was acting under their instructions **in any manner**, then that would create an agency." Also, in subsequently giving the latter part of the instruction above quoted, the Trial Judge gave emphasis by repetition to this error. These errors were made the basis of grounds XIX and XX of Flour Mill's motion for a new trial, which motion the trial Court disallowed (Tr. 182, 183).

IV (d).

It was error for the Trial Judge to instruct the jury as follows:

> "However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all of the defendants." —Tr. 1127.

This was made the basis of ground XVI of Flour Mill's motion for a new trial which motion the Trial Court disallowed.—Tr. 182. This prejudicial charge in effect directed a verdict for the plaintiff. Under this instruction the jury had no alternative but to return a verdict in favor of the plaintiff. A conscientious juror hearing this charge could not follow this instruction and at the same time bring in a verdict for defendant Flour Mill. There was no dispute whatever as to the way and manner in which the accident occurred.

3. Petition for Writ of Certiorari.

V.

Also, petitioner respectfully shows that the provisions of the Constitution of Tennessee as set out in Section 8, Article 1, and the 7th Amendment to the United States Constitution appear to have been violated by the trial judge's action (and by the affirmance of the Court of Appeals), when the trial judge instructed the jury in such a misleading manner as to authorize the taking of the property of Flour Mills by verdict and judgment, without giving to Flour Mill the right provided by our Constitutions of a fair determination of the issue of agency. Instead, the Court in effect directed the jury that Johnson was the agent and servant of Flour Mill. If the trial court was to take any action in that regard it should have been to instruct the jury that Johnson was not such an agent under the proof that had been introduced. Instead, the trial court charged the jury in such manner, unsupported by legally sufficient evidence, as to deprive Flour Mills of its constitutional rights.

VIII.

In at least two instances in the charge of the Court to the Jury, the Trial Judge in effect told the jury

to include Flour Mill in any verdict the jury brought in on behalf of the plaintiff. Those parts of the Court's instructions to the jury could not be interpreted otherwise, then or now.

(a) In one place the Trial Judge instructed the jury that if driver Johnson was acting under the instructions of Flour Mill "in any manner," then that would "create an agency," and in that event the jury could predicate liability of the Dixie Portland Flour Mill upon the negligence of James Lee Johnson. That part of the charge was assigned as error "IV (a)" before the Court of Appeals, the body of that Assignment being:

> "It was error for the Trial Judge to instruct the jury as follows:
>
> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland **Flour Mills**, Inc., was his principal at the time, that is, that he **was acting under their instructions in any manner**, then that would create an **agency**, and in that event you could **predicate the liability** of the **Dixie Portland Flour Mills upon** the **negligence of James Lee Johnson**, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Inc." (Tr. 1132) (Emphasis supplied).

A little later and at a different place in the Charge, the Trial Judge emphasized this error by further instruction to the jury, which was also included as a part of that same Assignment of Error before the Court of Appeals, the Trial Judge then saying to the jury:

> "If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Inc., at the time and

place of this accident, then his acts would be attributable to that defendant" (Tr. 1133).

(b) Another instance of error to instruction which was woefully prejudicial to the petitioner Flour Mill occurred when the Trial Judge mistakenly charged the Jury as follows:

> "However, the Court instructs you that if you believe the **theory and insistence of the plaintiff as to the way and manner** in which this accident occurred to **be true** from a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and **your verdict would be in favor** of the **plaintiff against all the defendants**" (Tr. 1127) (Emphasis supplied).

The charge as to agency in effect "hammered in the nails in the coffin" insofar as petitioner Flour Mill was concerned; but the charge just quoted above "set the nails so firmly that there was no chance" for any fair consideration of the insistence and defenses presented by petitioner Flour Mill. The Trial Judge by so instructing the jury effectively directed a verdict for the plaintiff against "**all the defendants**" on the basis of "the **way and manner in which the accident occurred.**" To a member of the jury, an average layman, the words, "the way and manner in which this accident occurred" could have no meaning other than a specific reference to the action of driver Johnson in causing the truck to jump backward against the wall, knocking the wall against plaintiff Byrd. As to this "way and manner in which this accident occurred" there was no dispute in the record. Thus, affirmatively and positively and to the prejudice of petitioner Flour Mill, the jury was directed to render a verdict in favor of the plaintiff against this defendant.

IX.

* * * * * * * * *

Petitioner Flour Mill now files with this Petition its Assignments of Error and Brief in support thereof, which petitioner requests to be treated as a part of this Petition.

Assignments of Error (Supreme Court).

I.

The Court of Appeals Erred in Overruling Petitioner's Assignment as to the Trial Judge's Instruction to the Jury as to gency.

It was error for the Court of Appeals to overrule petitioner's Assignment of Error IV (a) in which petitioner assigned as error the action of the Trial Judge in instructing the jury as follows:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland **Flour Mills**, Incorporated, was his principal at the time, that is, that he was **acting under their instructions in any manner**, then **that would create an agency**, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated" (Tr. 1132). (Assignment of Errors and Brief of Flour Mills, pp. 13 and 14). (Emphasis added.)

And further it was error for the Court of Appeals to overrule the second part of that same Assignment of Error presented to that Court, being that part of the Court's

Charge to the jury in which the Trial Judge then instructed as follows:

> "if you find from the proof in this case that the defendant Johnson was the **agent of or servant** of the Dixie Portland **Flour Mills**, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendent" (Tr. 1133). (Assignment of Errors to Court of Appeals, p. 14). (Emphasis added.)

These errors were made the basis of grounds XIX and XX of petitioner's motion for a new trial which the Trial Court disallowed (Tr. 182, 183).

In its Opinion the Court of Appeals refers to this assignment on pages 12 to 14.

In overruling this Assignment that Court mistakenly described this part of the Charge as being considered "ambiguous rather than affirmatively erroneous" (Page 14, Opinion of Court of Appeals filed July 22, 1963). The record when considered in its entirety affirmatively shows that this error affected the result of the trial to the detriment of petitioner Flour Mill.

VII.

(b) It was error and in violation of Sections 6 and 8 of Article 1 of the Constitution of Tennessee and in violation of the Seventh Amendment to the Constitution of the United States for the trial judge to usurp the functions of the jury, and to deprive Flour Mills of due process—the law of the land by affirmatively instructing the jury that Johnson, the employee of the Dixie Feed & Seed Company by acting under the instructions of Flour Mill became the agent of Flour Mill, and that his acts would be attributable to Flour Mills; and also that if the jury

believed the theory and insistence of the plaintiff as to the way and manner in which the accident occurred then the verdict of the jury would be against defendant Flour Mills along with the other defendants. These parts of the charge of the trial judge as delivered by him to the jury are fully set out in Assignments of Error I and VIII of these Assignments here before this Court, and these portions of the charge of the trial court are here incorporated by reference.

VIII.

The Court of Appeals Erred in Overruling Petitioner's Assignment of Error as to the Trial Judge's Instruction to the Jury That if They Believed the Theory and Insistence of the Plaintiff as to the Way and Manner in Which the Accident Occurred the Jury's Verdict Would Be for the Plaintiff Against All Defendants.

It was error for the Court of Appeals to overrule petitioner's Assignment of Error IV (d) in which this petitioner assigned as error this action of the Trial Judge in instructing the jury as follows:

> "However, the Court instructs you that if you believe the theory and **insistence of the plaintiff as to the way and manner in which this accident occurred** to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and **your verdict would be** in favor of the plaintiff **against all** of the **defendants** (Tr. 1127). (Petitioner's Assignment of Errors in the Court of Appeals, p. 16 at the top of the page.) (Emphasis added.)

This error was made the basis of ground XVI of the Flour Mills' motion for a new trial (Tr. 147) which motion the Trial Court disallowed (Tr. 182). Here again the Court of Appeals did not make specific reference to this ground, simply "lumping it in" with other grounds relied upon by petitioner with a comment that it was not prejudicial (Court of Appeals' Opinion, July 22, 1963, p. 14).

We respectfully submit that this Charge to the jury by the Trial Judge was prejudicial to the extreme. In effect, it instructed the jury that if they believed (the undisputed facts) that the Feed and Seed Company's driver Johnson left his tractor in gear when, after parking it and stopping it, he cut off the ignition, so that it jumped back, striking the wall and knocking parts of it against Mr. Byrd—that if they believed this was "the way and manner in which the accident occurred", then all of the defendants would be guilty of negligence and the verdict of the jury would be in favor "of the plaintiff against all the defendants."

Thus, the court itself determined that all parties defendant were negligent as a matter of law, thereby depriving the petitioner of its right to have the jury make a determination of the most vital question in the case—whether any defendant was guilty of any actionable negligence. Moreover, this instruction precluded a verdict in favor of any defendant then in the case.

Brief and Argument.

II.

The Verdict and Judgment as to Flour Mill Should Be Set Aside by Reason of Denial of Due Process and Constitutional Rights.

(a)

Section 6 of Article I of the Constitution of Tennessee provides that "trial by jury shall remain inviolate" in the State of Tennessee. Section 17 of the State Constitution provides that no person shall be deprived of his property without due process of law. The Fourteenth Amendment of the United States Constitution does not inherently grant a party a right to a trial by jury, however, it has long been recognized under this Amendment that a person's property cannot be taken from him without due process of law. The due process requirement of the United States Constitution can only be met if the trial on the state level is had according to the settled course of judicial proceedings in that particular state. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678, and Gunn v. Union R. Co., 62 A. 18, 2 L. R. A., N. S. 362. Therefore, since the state Constitution guarantees a trial by jury as the "settled course of judicial proceedings" in Tennessee, then failure to grant the defendant a trial by jury in the instant case is a violation of the Fourteenth Amendment of the United States Constitution.

In Santi v. Duffey, 40 Tenn. App. 237, 290 S. W. 2d 884, the court held that where the trial court gave an instruction which directed a verdict against the defendant that such an instruction was a misdirection and deprived the plaintiff of his constitutional rights of trial by jury. In the instant case, the trial court directed a verdict by its instructions and consequently removed

from the jury the opportunity to determine whether or not the defendant should be deprived of his property. By the trial court's action the province of the jury was invaded on this pivotal issue, and, conversely, the defendant's right of trial by jury was taken from him. On this issue, alone, this case should be remanded for a new trial.

(b)

By stressing this assignment of error, we do not wish to seem to have waived our insistence that the Trial Court should have directed a verdict for the defendant Flour Mill. However, if the Trial Court was to submit the case to the jury as to Flour Mill, that court should have taken care not to deprive Flour Mill of its constitutional rights. When the court, while ostensibly submitting the issues to the jury, so charged the jury as to in effect direct them to return a verdict against Flour Mill, that court then violated the safeguarding provisions of both the Constitution of the United States and that of the State of Tennessee. When the trial court so erroneously charged the jury as to in effect instruct the jury that Flour Mill should be found liable to the plaintiff, it deprived Flour Mill of that right intended to be preserved by Amendment 7 to the U. S. Constitution—the right for the jury to determine that issue; and for all practical purposes it thus deprived Flour Mill of its property by saying in effect to the jury that a sum of money should be taken from Flour Mill and given to plaintiff. These instructions given by the trial judge were so worded that the only thing left for the determination of the jury was the amount at the verdict—the amount of defendant's property so to be taken. Leaving to the jury only the question of the amount was a violation of the provisions of both Constitutions. They were intended to assure a defendant that issues

of fact would be determined by the jury and that no defendant would be deprived of his property "but by the judgment of his peers of the law of the land."

Where the controlling propositions of law governing the case are not properly stated to the jury our courts have held that this amounts to the denial of the constitutional rights of trial by jury.

> "It is the right of the litigant to have the propositions of law governing the case plainly stated to the jury." Martin v. Castner-Knot Dry Goods Co., 27 Tenn. App. 421, 181 S. W. 2d 638, 642.

In the case just cited the Court concluded from the record that the trial judge had submitted the case to the jury on an "erroneous theory of the law." The Court then held that it must reverse and remand for a new trial despite the provisions of Code Section 10654 (now Tennessee Code Annotated 27:117).

Also in a more recent case, in a case where the trial judge in his charge misstated the law applicable, Judge Felts speaking for the Court said:

> "Under these instructions, the jury were bound to render a verdict against the plaintiff if they found that Mrs. Santi was a guest in the car and was killed by the driver's negligence, as charged in the declaration. Such error simply amounted to a misdirection of the jury, and deprived plaintiff of his constitutional rights of trial by jury." Santi v. Duffey, supra.

The Court here in this case now before this Court, should set aside the verdict of the jury. We feel that the record shows that as to defendant Flour Mill the suit should be dismissed. If we are mistaken in that, then the case should be remanded to the trial court for a new trial.

Petition to Reconsider and Hear and Brief and Argument in Support Thereof.

To the Honorable Supreme Court of the State of Tennessee Sitting at Knoxville or to Any One of the Judges Thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,
Plaintiffs-in-Error,

v.

Stanifer G. Byrd,
Defendant-in-Error.

Styled as Cause No. 88. Hamilton County Law in the Court of Appeals.

Petition to Reconsider and Hear.

Your petitioner, Dixie Portland Flour Mills, Inc., would respectfully show to the Court that it is much aggrieved by the judgment and action of the Court announced in this case on the 5th day of March, 1964, wherein the Court denied the Petition for Certiorari filed by Dixie Portland Flour Mills, Inc., in this cause.

Petitioner, Dixie Portland Flour Mills, Inc., respectfully directs the attention of the Court to its Assignment of Error VII "The Trial Court and the Court of Appeals erred in denying petitioner Flour Mill due process of law."

By this Assignment petitioner pointed out violations of both the Constitution of the State of Tennessee and the Constitution of the United States of America. This Assignment addresses itself particularly and peculiarly to the Supreme Court of this State, and the errors assigned, though presented in the proceedings in the Court of Appeals, were not specifically ruled on by that Court. The attention of this Court is therefore directed to this Assign-

ment appearing on pages 23 to 25 of the printed Assignment of Error in the Petition for Writ of Certiorari, and to the Brief and Argument presented in that connection commencing on page 49 of said Petition. All of this material is here incorporated by reference.

It is earnestly insisted on behalf of the Petitioner that this Court should grant the Petition for Writ of Certiorari, and grant a hearing on these and the other Assignments. The history and facts of this case, the seriousness of the matters involved, and the gravity of the errors indicated, all combine to justify this Court granting the Petition and fully hearing the cause.

Petitioner further would show that the State Court jurisdiction as to the constitutional questions rests primarily, if not exclusively, in the Supreme Court of this State. Petitioner believes that its Assignment in this connection is well grounded. If this Court fully hears this cause, it is the hope of petitioner that a further appeal or petition to the Supreme Court of the United States will be unnecessary.

Petitioner Therefore Prays:

(1) That this Honorable Court reconsider, and that it reverse and set aside the action heretofore taken on March 5, 1964; and

(2) That this Court now grant the Writ of Certiorari and fully hear this case.

Strang, Fletcher, Carriger & Walker,

By: .....

Attorneys for Petitioner, Dixie Portland Flour Mills, Inc.

The Court of Appeals seems to have given no serious consideration to the actions of the Trial Judge, John T. Mahoney, which deprived the defendant, Dixie Portland Flour Mills of its constitutional rights to due process of law. In taking that approach, that Court may have recognized that the major responsibility in Tennessee for determining such constitutional questions rests on our Supreme Court. In any event we respectfully direct this Court's attention to and here incorporate by reference the citations and arguments presented on pages 49 to 52, inclusive, of our Brief in the printed Petition for Writ of Certiorari.

Some years ago in an opinion by Mr. Justice Green, this Court said that "when any question involving the constitutionality of an act of the legislature is *bona fide* made and relied on in a case, the Supreme Court should take Appellate jurisdiction," and that the decision of such a constitutional question was for this Court rather than for the Court of Appeals (Memphis Street Railway Co. v. Rapid Transit Co., 133 Tenn. 83, 104 and 105, 179 S. W. 635). A statute then in effect seems to have directed that the Supreme Court take jurisdiction, but it is significant that in the official reporting of that decision the words "bona fide" are in italics. In the case now before this Court, this is truly a **bona fide question and assignment.**

We did not attempt to deprive the Court of Appeals of jurisdiction by reason of the constitutional questions. However, those matters were then and are now relied upon in good faith, and merit consideration and determination.

Mr. Justice Neil in an opinion delivered in 1945 approved the definition of "due process" condensed into one sentence:

"In judicial proceedings due process of law means a course of proceeding according to those rules and principles which have been established for the protection and enforcement of private rights."—Tenn. Cent. Ry. Co. v. Pharr, et al., 183 Tenn. 658, 663, 194 S. W. 2d 486.

As to those parts of the assignment charging violations of the provisions of the Federal Constitution it seems clear that this Court should act to protect and enforce those rights to which this petitioner is lawfully entitled.

In an opinion written by Mr. Justice Black referring to the Federal Constitution, the Supreme Court of the United States has said:

"That Constitution is the supreme law of the land, and 'upon the state courts equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.'"

Smith v. O'Grady, 312 U. S. 329, 61 S. Ct. 572, 573 85 L. Ed. 859;

Quoting in part from Mooney v. Holohan, 294 U. S. 103, 113, 55 S. Ct. 340, 79 L. Ed. 791.

We respectfully ask that this Court now reconsider, grant the Petition for Writ of Certiorari and hear this cause.

Respectfully submitted,

Strang, Fletcher, Carriger & Walker,

By: John S. Carriger,

Attorneys for Petitioner,

Dixie Portland Flour Mills, Inc.

Application for Leave to File Second Petition for Rehearing.

To the Honorable Supreme Court of the State of Tennessee Sitting at Knoxville or to Any One of the Judges Thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs-in-Error, vs. Stanifer G. Byrd, Defendant-in-Error.	Styled as Cause No. 88. Hamilton County Law, in the Court of Appeals.

Application of Dixie Portland Flour Mills, Inc., for Leave to File a Second Petition for Rehearing.

Comes now Dixie Portland Flour Mills, Inc. (a plaintiff-in-error), by its attorneys, Strang, Fletcher, Carriger & Walker and O'Neil, Jarvis, Parker & Williamson, and respectfully petitions this court, or any of the judges thereof, to grant special leave for the filing of a Second Petition for Rehearing pursuant to Rule 32 of the Rules of the Tennessee Supreme Court, and as grounds therefor states, *inter alia*:

1. That this honorable court in denying the Petition for Certiorari has in effect permitted the Court of Appeals to enunciate a hitherto non-existent common law duty and impose that duty upon the appellant.

2. The Court of Appeals has permitted to stand reversible error committed by the trial court inconsistent with controlling Tennessee decisions on each assignment of error raised.

3. The action of the trial court and the Court of Appeals has effectively abridged the constitutional rights of the applicant, both state and federal.

Wherefore, your applicant respectfully prays that this court give an order granting special leave to the applicant to file a Second Petition for Rehearing in this cause.

Dixie Portland Flour Mills, Inc.,
By Howard F. Jarvis,
Counsel,
By John S. Carriger,
Counsel.

Strang, Fletcher, Carriger & Walker,
O'Neil, Jarvis, Parker & Williamson,
Of Counsel for Plaintiffs-in-Error.

Second Petition for Rehearing.

To the Honorable Supreme Court of the State of Tennessee sitting at Knoxville or to any one of the judges thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,
Plaintiffs-in-Error,
vs.
Stanifer G. Byrd,
Defendant-in-Error.

Styled as Cause No. 88. Hamilton County Law in the Court of Appeals.

Second Petition of Dixie Portland Flour Mills, Inc., for Rehearing.

The petitioner, Dixie Portland Flour Mills, Inc., respectfully moves that this honorable court Reconsider and

Hear its Petition for Certiorari previously filed in this case and as grounds in support thereof states:

Basic Facts.

Petitioner, Dixie Portland Flour Mills, Inc., owned and operated a grain elevator and in connection therewith it maintained certain driveways and a lot surrounded in part by a concrete block wall. Dixie Feed and Seed Company (not affiliated or connected in any way with the petitioner) operated a certain tractor trailer unit, the loaded weight having exceeded 30 tons, which, on the 11th day of July, 1960, delivered a load of grain to Dixie Portland's warehouse. While parking to wait for other trucks to complete the weighing in and loading or unloading operations, the driver of said tractor trailer backed his truck to a stop with the rear end within one foot of the concrete block wall and when he removed his foot from the clutch, after having turned off the ignition, the unit jumped backward with the motor still running and struck the wall, knocking part of it out onto the sidewalk and street. Plaintiff, who was walking along the sidewalk, adjacent to the wall, was struck by the falling parts of the wall and seriously injured. This was the "way and manner" in which this accident occurred and this was plaintiff's "theory and insistence" of the "way and manner" in which it occurred, and, likewise it was the "way and manner" in which all parties insisted that it occurred. In other words, there was absolutely no dispute as to the "way and manner" in which the accident occurred. All parties agreed and all of the evidence in the case conclusively showed, without any basis whatever for even an inference that the accident occurred in any other way or manner, that this was the "way and manner" in which the accident occurred.

Thus, it is beyond dispute that there was no issue as to the "way and manner" in which the accident occurred.

The dispute and issue involved was why the accident occurred, whether because of the negligence of one or more of the defendants.

I.

In denying certiorari, this honorable court has overlooked and failed to consider that a hearing on petitioner's contentions that its basic and fundamental constitutional rights to trial by jury and due process of law under both State and Federal Constitutions has been denied by the lower courts and in the absence of a review by this court, petitioner is denied the right to a consideration of and a ruling upon these important and basic questions. The basic and fundamental constitutional questions involved are, in substance, as follows:

The issues involved, which the parties were entitled to have the jury decide, as pointed out by the opinion of the Court of Appeals when they said "It is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury" (Op. p. 11), were (1) whether the defendants were guilty of any acts or omissions which constituted negligence, and (2) whether such negligence, if any, was a direct or contributing proximate cause of plaintiff's injuries.

There was no dispute whatever as to the "way and manner in which this accident occurred." All parties pleaded, insisted and their evidence showed that plaintiff's injuries were sustained as the result of the Dixie Feed truck striking the concrete block wall of Dixie Portland's lot and knocking parts thereof against plaintiff who was walking on the sidewalk adjacent to the wall. **Absolutely no question existed as to the "way and manner" in which the accident occurred.**

In a verdict directing instruction, complete within itself, the court instructed the jury that if they found and

believed that "the theory and insistence of plaintiff as to the way and manner in which this accident occurred" was true, "then defendants would be guilty of negligence and your verdict would be in favor of the plaintiff and against all of the defendants" (Tr. 1127).

The court also instructed the jury that "you are to take the law as given you and charged by the court."

Since it would have been impossible for the jury to have avoided the conclusion that the accident occurred in the "way and manner" contended for by plaintiff (there being no evidence or inference supporting a contrary or different conclusion) this instruction amounted to a direction of a verdict in favor of plaintiff and against all defendants. Naturally, the jury followed this mandate and rendered such a verdict. In so directing a verdict, without requiring the jury to decide the real issues in the case, the trial court deprived the defendants of their constitutional right to trial by jury as provided for by Sections 6, 8, 17 of Article I of the Constitution of Tennessee.

In holding that no prejudicial error was committed by the giving of the verdict directing instruction quoted in Point I above, the decision of the court of appeals fails to follow and is directly contrary to and in conflict with **Santi v. Duffey**, 290 S. W. 2d 884, 40 Tenn. App. 237, which holds that a verdict directing instruction which misdirects the jury amounts to a deprivation of a party's constitutional right to a trial by jury and requires reversal of the case.

II.

The decision of the Court of Appeals disposed of petitioner's contention that the above instruction was prejudicially erroneous and constituted the direction of a verdict by merely saying,

"Other assignments relating to the charge have been considered and found to be without merit because not shown to be prejudicial in view of the undisputed evidence of common law negligence or because not included in the motion for a new trial."

The Motion for a New Trial, Assignment XVI on page 14 thereof, specifically raises the error in the giving of this verdict directing instruction. There was no undisputed evidence of common law negligence and the only undisputed evidence was as to the "way and manner" in which the accident occurred.

Thus, as the Record stands, by refusing certiorari, this court has inferentially found nothing wrong with the court of appeals decision, despite the fact that it refuses to rule upon this important constitutional question for two stated reasons, both of which are shown by the Record to be without foundation. Moreover, since the court of appeals further held that "it is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury" (Op. p. 11), the effect of their ruling is that it is not prejudicial error to give an erroneous verdict directing instruction, containing a positive misdirection, if there is undisputed evidence of common law negligence (Op. p. 14) which presents a jury question. In so holding, the court of appeals announces a unique principle of law and overlooks and fails to follow the decisions in **Santi v. Duffey**, 290 S. W. 2d 884, 40 Tenn. App. 237; **Nashville Ry. & Light Co. v. Dungey**, 128 Tenn. 587, 163 S. W. 802; **McClaird v. Reid**, 229 S. W. 2d 505, 190 Tenn. 337.

III.

In holding that an instruction to the effect that if the Dixie Feed driver, co-defendant Johnson, was acting under petitioner Dixie Portland's "instructions in any manner,

then that would create an agency, and in that event, you could predicate the liability of Dixie Portland Flour Mills, Inc., upon the negligence of James Lee Johnson" (Op. pp. 12-13), was proper and did not constitute prejudicial error, the Court of Appeals completely failed to consider or follow the following controlling decisions of this state which announce the rule that far more than mere "instructions in any manner" is required to establish agency. **Income Life Ins. Co. v. Mitchell**, 168 Tenn. 471, 79 S. W. 2d 572; **Powell v. Construction Co.**, 88 Tenn. 692, 13 S. W. 391; **Knight v. Hawkins**, 26 Tenn. App. 448, 173 S. W. 2d 163; **Gulf Refining Co. v. Huffman**, 155 Tenn. 580, 297 S. W. 199; **Smart v. Embry**, 208 Tenn. 686, 348 S. W. 2d 322.

Plaintiff charged that the Dixie Feed driver Johnson was also the agent of petitioner Dixie Portland. The only evidence produced was to the effect that on Johnson's first trip to Dixie Portland Mill months before this accident, a foreman of the Flour Mill told Johnson what area of the lot to park in when waiting his turn to weigh in. Plaintiff's evidence also showed that Johnson was not told or instructed where to park on the day of the accident. In fact, on that day there was no employee of the Flour Mill present (Tr. 582). On the basis of this evidence, standing alone, the trial court gave the following instruction:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find

that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated" (Tr. 1132). (Assignment of Errors and Brief of Flour Mills, pp. 13 and 14.)

In overruling petitioner's contention that the above charge was prejudicially erroneous, the Court of Appeals said:

> "At first blush, it seems erroneous to consider Johnson the agent of the Flour Mills. However, the Record shows that one reason for lining up the trucks near the wall as they entered the premises was to prevent congestion which might interfere with the movement of trucks out of the plant carrying the finished product of the Flour Mills. **To that extent, it had an interest in the parking of trucks near the wall and to that limited extent we think if Johnson acted under the instructions of the Flour Mills he might be considered its agent**" (Op. pp. 13-14).

The Opinion cites no authority for any such rule and we have been unable to find any such rule announced by any authority in any jurisdiction in this country.

Moreover, the opinion of the Court of Appeals, while stating that, "we think it would have been better either to have omitted this charge altogether" (Op. p. 14) further concluded that, "it does not affirmatively appear that this portion of the charge affected the result of the trial" and that "we think it most unlikely that the jury gave any consideration to whether Johnson acted as agent for the Flour Mills in parking the truck and cutting the switch in such close proximity to the wall, as charged. The charge is not necessarily to be taken as leaving that question to the jury and, therefore, is to be considered ambiguous rather than affirmatively erroneous" (Op. p. 14). What is ambiguous about this instruction? In clear and concise language it tells the jury in no unmistakable terms that,

if they find that Johnson was negligent, and, that he was acting under Dixie Portland's instructions in any manner, then that would create an agency and make Dixie Portland Johnson's principal at the time, in which event the jury could predicate the liability of Dixie Portland upon Johnson's negligence.

We respectfully submit that this is clearly an erroneous statement of the law of agency of Tennessee as announced by the above authorities and that the rights of this petitioner were necessarily prejudiced by the giving thereof.

Petition for Stay of Execution, as Amended.

To Any of the Judges of the Eastern Section of the Court of Appeals of Tennessee.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,

v.

Stanifer G. Byrd.

} Hamilton Law.

Petition of Dixie Portland Flour Mills, Inc., for Stay of Execution.

(Filed Apr. 16, 1964, W. H. Eagle, Clerk.)

Comes the Dixie Portland Flour Mills, Inc., one of the defendants, against whom a judgment for damages has been rendered in this cause, through its attorney, John S. Carriger, and petitions this Court, or any of the Judges thereof, to grant to this Petitioner a stay of execution, pursuant to Title 28, Section 2101 of the U. S. Code Annotated, for a sufficient time to enable it to obtain a

Writ of Certiorari from the Supreme Court of the United States.

Petitioner is operating a successful and long established business in Chattanooga, Tennessee, and its counsel is informed and on information and belief avers that it is fully solvent and amply able to pay "any damages and costs" which Stanifer G. Byrd may sustain by reason of the stay as mentioned in said Code Section, in the event it finally should be required to make such payment. Petitioner therefore asks that the stay not be conditioned on the giving of any security.

This 15th day of April, 1964.

Dixie Portland Flour Mills, Inc.,
By: John S. Carriger,
Attorney.

State of Tennessee, }
County of Hamilton. }

John S. Carriger, one of the attorneys for Petitioner, makes oath in due form of law that the statements in the foregoing Petition made of his own knowledge are true and that those made on information and belief he believes to be true.

John S. Carriger.

Sworn to and subscribed before me this 15th day of April, 1964.

Mary L. Baker,
Notary Public.

My Commission expires: Jan. 8, 1968.

I certify that I have served a copy of this Petition on H. Keith Harber, Attorney for Stanifer G. Byrd, by

placing in the U. S. Mail, with proper postage affixed a true copy thereof addressed to him at his office in the Pioneer Bank Building, Chattanooga, Tennessee.

This 15th day of April, 1964.

John S. Carriger.

To Any of the Judges of the Eastern Section of the Court of Appeals of Tennessee.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,

v.

Stanifer G. Byrd.

} Hamilton Law.

Amendment to Petition of Dixie Portland Flour Mills, Inc., for Stay of Execution.

(Filed May 8, 1964, W. H. Eagle, Clerk.)

Comes the Dixie Portland Flour Mills, Inc. and amends its Petition heretofore filed for stay of execution as follows:

(1) By striking therefrom the last sentence in the second paragraph and substituting in lieu thereof the following:

"Petitioner tenders herewith and asks approval of the Supersedeas Bond in the amount of Three Thousand Twenty-five Thousand ($325,000.00) Dollars with General Insurance Company of America as surety and with power of attorney duly attached, which Bond has been executed and will be tendered to the Judge hearing this Petition, at the hearing."

(2) By adding to said original Petition an additional paragraph as follows:

"Petitioner files herewith and incorporates by reference a partial listing of grounds which Petitioner expects to include in its Petition for Writ of Certiorari. Petitioner avers that it believes that it has a proper and substantial federal question which should be reviewed by the United States Supreme Court and that such question was actually and reasonably raised."

Dixie Portland Flour Mills, Inc.,
By: John S. Carriger,
Attorney.

State of Tennessee,
County of Hamilton.

John S. Carriger, one of the attorneys for Petitioner, makes oath in due form of law that the statements in the foregoing Petition made of his own knowledge are true and that those made on information and belief he believes to be true.

John S. Carriger,

Sworn to and subscribed before me this 4 day of May, 1964.

Louise Falkner.
Notary Public.

My Commission expires: 11-17-65.

I certify that I have served a copy of this Petition on H. Keith Harber, Attorney for Stanifer G. Byrd, by delivering a true copy thereof to him, in Chattanooga, Tennessee, this 4th day of May, 1964.

John S. Carriger.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, Robert E. Cooper and James W. Parrott, when the following proceedings were had to-wit:

Monday, May 11th, 1964.

In the Court of Appeals of Tennessee, Eastern Section.

May Term 1964.

Dixie Feed & Seed Company, Inc., James Lee Johnson, and Dixie Portland Flour Mills, Inc., Plaintiffs-in-Error, v. Stanifer G. Byrd, Defendant-in-Error.	Hamilton Law. No. 88.

Order.

(Filed May 11, 1964, W. H. Eagle, Clerk.)

This cause came on to be heard on the petition and amendment thereto filed by Plaintiff-in-Error, Dixie Portland Flour Mills, Inc., a Supersedeas Bond in the amount of Three Hundred Twenty-five Thousand ($325,000.00) Dollars having been tendered, for a stay of execution of the judgment in this case for a period of time sufficient within which to obtain a Writ of Certiorari from the Supreme Court of the United States. Briefs have been submitted and counsel heard for the parties.

The Court finds that no substantial Federal question reviewable by the United States Court has been actually and reasonably raised by petitioner.

The Petition is, therefore, denied. The exception of petitioner to this finding, action and order is noted. Costs incident to the filing of this petition are adjudged against Dixie Portland Flour Mills, Inc.

Enter this 8th day of May, 1964.

R. E. Cooper,
Robert E. Cooper, Judge.

Strang, Fletcher, Carriger & Walker,

By: John S. Carriger,
Attorney for Dixie Portland Flour Mills, Inc.

H. Keith Harber,
Attorney for Stanifer G. Byrd.